

Title: Market Vulnerabilities: Policy Intersections and Students with Disabilities in the Context of Out-of-School-Time Tutoring

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Abstract: Despite the protections offered by the Individuals with Disabilities Education Act, students with disabilities who participate in out-of-school market-based educational services may be put in a vulnerable position in terms of access to and quality of services. Various legal requirements and protections interact in ways that affect their participation. We examine these interactions and their implications, particularly in the areas of tutor capacity and student record confidentiality, using a policy sociology framework that acknowledges both macro- and micro-level influences. Our analysis draws on public policy texts and qualitative data from a mixed-methods, longitudinal study of SES in four districts. Our findings suggest that, despite policymakers' aversion toward regulation of private providers under market-based policies, these providers should be required to hire qualified teachers to work with students with disabilities; in addition, all stakeholders need to work toward a system that enables the sharing of student special education records.

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Introduction

Supplemental Educational Services (SES), a provision of No Child Left Behind (NCLB) that reallocates a percentage of a district's Title I funding to out-of-school-time (OST) tutoring, has received both criticism and support for its mandated market-oriented design. However, there are particular design elements of the policy that interact with other laws and put students with disabilities in an especially vulnerable position in terms of access to and quality of services. Laws protecting students with disabilities—such as the Individuals with Disabilities Education Act (IDEA)—do so using a “zero-reject” framework, whereas policies that utilize market-place reforms (such as SES) utilize a framework that relies on competition and resource scarcity. Students with disabilities who are eligible for SES are affected by the interactions of these laws in design and implementation. This paper examines access to and quality of SES for students with disabilities through a lens that acknowledges both macro- and micro-level influences.

Despite the importance of this topic, few studies of SES or other market-based reforms examine them in the context of existing legislation that protects the same subgroups targeted by the market-based reforms. Students with disabilities comprise an especially significant subgroup that merits detailed attention, due to the strong legal protections of the IDEA. It is crucial to examine the intersections of these laws because they set the ground rules for students' basic access to educational services (Ysseldyke et al. 2008). This study begins to fill gaps in the literature, providing in-depth analysis of how policy interactions affect the quality of the SES program for students with disabilities in two areas: Tutor capacity, and issues related to

confidentiality. These patterns are especially likely to occur in OST market-based reforms, where school-day legal protections may not extend.

SES Policy Context

The federal mandate for SES and the market-oriented design of the program are two of the most significant shifts in Title I service provision under NCLB. After a district has not made adequate yearly progress (AYP) on state standardized exams for three or more years, the federal policy reallocates 20% of a district's Title I grant to fund SES. Specifically, the 20% set-aside must be reallocated away from other interventions, such as pull-out remedial instruction or school-wide programming (e.g., Wong and Meyer 2001). Although many states have received waivers exempting them from implementation of SES, the two issues examined here—instructor capacity and confidentiality—are relevant for any OST, third-party educational context.

The design of SES loosely resembles a contracting regime (e.g., Cucchiara et al. 2011; Henig 2010; Hill et al. 1997). When a district is required to offer SES, several steps of implementation take place: the state requests applications and approves SES third-party providers (which may include for-profit, non-profit, or faith-based organizations; Heinrich 2010). The district informs eligible families about the program and about approved providers in the district; the district creates a contract with each provider selected by a parent; and the state must monitor and evaluate the providers' services and the district's fidelity of implementation. Providers are not required to serve students with disabilities, and states cannot require providers to hire tutors with highly qualified teacher status (34 C.F.R. §200.47(b)(4); U.S. Department of Education 2009b, 17).

These policy design details suggest that SES may not adequately serve students with disabilities and provide the motivation for this in-depth analysis. As well, there is little existing literature on the experiences or outcomes of students with disabilities in SES, and the research that has been done shows almost no positive results for these students (Chappell et al. 2011). Quantitative analysis from our mixed-methods, multi-site study found that only four providers out of over 100 operating throughout five districts showed positive, significant effects for students with disabilities (Authors 2012).

There are two implementation trends regarding SES which also demonstrate the immediate need for research focusing on how students with disabilities are being served by the program. First, the number of students with disabilities being served is likely to go up as overall demand for SES increases. The law states that, when demand for SES is greater than available funding, districts must prioritize student participation based on their performance level (Sec. 1116(b)(10)(C)). Put differently, districts should prioritize services for those students “who are most at risk of failing to meet state achievement standards”; this is the wording used to clarify how to target students for Title I programs in general (“How are students selected for targeted assistance” 2010, 3). Some schools and districts are required to offer SES *only* because the students with disabilities subgroup did not meet AYP (e.g., Eckes and Swando 2009); especially in these cases, it makes sense to prioritize these services for the students in this subgroup. Even with the rising number of NCLB waivers in states across the U.S., states and districts that choose to continue to offer after-school tutoring using Title I funds must consider how to target those funds.

Second, as third parties—particularly private, for-profit entities—become more involved in the work of school improvement, they assume a larger role in the education of students with

disabilities. This change in educational service provision raises important questions about the relative capacities of private firms and public agencies to meet the needs of this historically underserved population, as well as their capacity to work together and the legal landscape of information-sharing and responsibilities under the law.

Research Focus

Drawing primarily on archival public policy analysis and qualitative fieldwork from a mixed-method study of SES implementation in four districts, this paper fills gaps in the empirical literature regarding factors that impede or enable access and quality instruction for students with disabilities in SES. In particular, this paper addresses two central questions:

- How do the designs of and interactions between NCLB and other legislation impact access to and quality of SES instruction for students with disabilities?
- What are the major barriers to implementation of SES for students with disabilities, and how have stakeholders addressed these barriers?

We begin by discussing how the framework of policy sociology helps address these research questions, especially in terms of making connections between specific micro-policy environments and macro-level patterns. We then provide a macro-level policy analysis of the legal and economic contexts for special education services. Finally, drawing on qualitative data from four districts, the micro-level data analysis addresses two areas related to instructional quality: tutor capacity, and issues related to confidentiality requirements and alignment between a student's Individualized Education Program (IEP) and SES instruction. We conclude with a summary of implications and recommendations for implementation and future policy authorizations.

Policy Sociology Framework

The questions at issue in this paper call for a framework that can incorporate both policy details—design and implementation—and social consequences (e.g., Ozga 1987). Policy sociology, which uses a sociological lens to analyze policies and their implementation, provides the appropriate framework. The framework allows us to look at market-based policies, which often have utilitarian goals such as efficiency and statistical effectiveness (Schneider and Ingram 1997), from the perspective of micro-level interactions and experiences that complicate the usefulness of a utilitarian focus (Hargreaves 1985). Policy sociology helps broaden our understanding of the policy past the partial picture offered by a utilitarian lens; the use of this framework allows us also to focus on micro-level consequences—especially those surrounding access and quality—that may not surface in a utilitarian analysis.

A policy sociology framework is particularly useful in examining intersections of the SES policy, policies governing education for students with disabilities, implementation perspectives on these policies at the micro-levels of district and provider administration and instructor perspectives, and actual classroom observations. Looking at these levels simultaneously allows us to analyze the current SES policy in a way that takes into account both the micro- and macro-policy levels. Using this framework, our examination of the broad macro-policy environment utilizes the analysis of policy texts. As Bove et al. (1992) describe, a policy text is “a ‘working document’ for . . . the bodies charged with responsibility for ‘implementing’ the legislation” (10). Analyzing policy texts involves looking at the balance of strict and flexible requirements, and the areas in which implementers may interpret and adapt policy. In addition, it can also involve examining the history of policy interpretation and the patterns of

implementation that specific texts have stimulated. As well, we see the context of the larger economic environment as closely intertwined with the texts, as this environment in some ways sets the boundaries for intended policy implementation (such as the functioning of private education markets).

One of the most important reasons to focus on both policy texts and environments—as opposed to only micro-level implementation—is the danger of seeing implementation problems as “located in” implementers. Recent research on policy implementation offers insights into the complexity involved in the translation of policy texts to policy implementation and vice versa (e.g., Ball, 1997). The literature on “street-level bureaucrats” interpretation and adaptation of policy texts informs our analysis of micro-level policy implementation (e.g., Weatherley and Lipsky 1977); in particular, we examine the perspectives of policy implementers—such as private provider administrators, district administrators, and tutors—and how these perspectives shape their actions and, ultimately, access and service quality for students with disabilities.

In addition, the recent policy implementation literature examines the implementation processes beyond the utilitarian ideas of “implementability” and “success”; this literature focuses instead on “under what conditions, if any, . . . policies get implemented and work” (Honig 2006). This analytical perspective focused on complexity in policy implementation, situated in our larger framework of policy sociology, allows us to examine in-depth both the influences of the larger policy contexts as well as the complex, micro-level implementation patterns, which differ by local interpretations and capacities. Together, these frameworks help us come to a detailed picture of the impact of multiple policies and their implementation on students with disabilities who are eligible for SES and other OST reforms. It also allows us to make realistic recommendations for how the SES policy design could be improved for students with

disabilities, which is timely given that the U.S. Department of Education is granting waivers for SES in many states (U.S. Department of Education 2013).

Methodology

The qualitative portion of the mixed-methods evaluation uses a comparative case study design, where each district represents a case. Our design utilizes both within-case sampling as well as cross-case comparison. The rationale for within-case sampling is given by Miles and Huberman (1994): “We have to look carefully at the complex configuration of processes within each case, understand the local dynamics, before we can begin to see patterning of variables that transcends particular cases” (205-206). The second phase, cross-case analysis, is where the search for these “transcending” patterns occurs. The rationale for including multiple cases within one study is to achieve replication (Yin 2009); here, the goal is to identify patterns of implementation that can provide insight to policymakers regarding future policy designs. The theoretical framework—linking the macro-level policy context and the micro-level implementation contexts—is the guiding scheme for both research questions and analysis (Yin 2011).

The specific research focus and analysis in this paper draw on two sources of data: archival materials in the form of public policy documents, and qualitative data from a mixed-methods, longitudinal (2009-13) study of SES in four large, urban districts.¹ Examining our research questions using both policy texts and policy implementation data is consistent with the policy sociology framework; using these data sources in tandem allows us to compare policy assumptions and intentions with the actual implementation of SES for students with disabilities.

These comparisons then allow us to make policy recommendations around SES and other OST programs for students with disabilities.

Sample Selection and Protocols

Sample selection at each level of the case studies—district, state, provider, and parent—utilized sampling techniques that were appropriate for the stakeholder group (see Table 1 for a summary of data collected). Since all districts had committed to participation in the study, we were able to interview all district-level staff affiliated with SES implementation. At the state level, we interviewed all current SES staff who consented to be interviewed. Parents were recruited for focus groups using a range of recruitment strategies, depending on local context. These strategies included mailings from the district, community-based flyers, distribution of information through school-level coordinators, and distribution of information via providers in the qualitative subsample.

<Insert Table 1>

Considering the large number of total providers in each district, we identified criteria for the selection of a subsample of 4-6 providers per district. These criteria included: sufficient access to data; size of provider and/or parent demand patterns; variation in type, location, and format of tutoring; and length of time serving the district. Several providers that we recruited declined to participate; in these cases, we recruited other providers meeting these criteria. The provider sample had some fluctuation over the course of the study; providers could opt out at any time, and some went out of business or were no longer approved. Sampling of provider instructional staff often had to be done through higher-level provider managers due to the fact

that nearly all providers were private organizations. This type of sampling potentially introduced bias into the characteristics of tutors.

Interviews with district, state, and provider staff utilized semi-structured protocols. District- and state-level interviews focused on interpretation of program requirements, relationships with providers, and challenges. Provider administrator protocols focused on instructional programs, choice of curricula and assessments, challenges, and staff recruitment and training. Interviews with tutors focused on instructional formats, curriculum, adaptations for special student needs, and qualifications and training. Parent focus groups, which were offered in English, Spanish, Hmong, and Somali (where applicable), gathered information from parents about their experiences with program information, interactions with district, school, and provider staff, and satisfaction with the program. The protocol included response probes particularly regarding students with disabilities.

Data analyzed also included archival materials from the districts and providers that related to students with disabilities. We collected documents from providers regarding any aspect of service provision to this subgroup, including differentiated curriculum, training documents, and marketing materials. From districts, we collected documents with local (formal or informal) policies on the sharing of IEPs, documents regarding the coordination of special education staff with provider staff and/or parents (such as teacher referral forms), and recruitment materials. From state staff, we collected applications, scoring rubrics, and approved provider lists, which contained data regarding providers' self-reported abilities to provide services for students with disabilities. We also attempted to collect archival materials related to district provision of services (in the case that no approved provider was able to offer services); however, this situation did not occur in any of our study districts.

Data collection also included observations of tutoring sessions; field researchers used a reliability-tested observation instrument, including ratings for a range of qualitative indicators that were identified in the out-of-school-time literature as best practices linked to achievement gains (e.g., Lauer et al. 2006). However, in the analysis for this paper, only the observation data regarding tutor characteristics were utilized. (See Good et al., forthcoming, for an in-depth description of the observation instrument and reliability testing.)

All qualitative responses were analyzed using a coding scheme focused on areas of interest regarding students with disabilities that were identified from emerging analyses of first-year (2009-2010) data. These included “Areas of Confusion,” “Curriculum,” “Instruction,” “Format,” and “Challenges.” Table 2 shows the types of data analyzed to answer each research question. The comparative case study design also included processes for triangulating observations and bases for interpretation (Denzin 1978). Our coding of all data within the same coding scheme, as well as memoing and cross-site discussions of emerging themes, revealed the overarching patterns discussed. These analytic processes served to triangulate patterns as well as search for disconfirming evidence.

<insert Table 2>

Macro-Policy Context

Intersections of IDEA and Title I Policy Designs

The policy context in which SES is situated includes the two major pieces of legislation governing K-12 students with disabilities—IDEA and NCLB—as well as the economic context of funding for students with special needs. This analysis of the larger policy and economic contexts allows us to understand the environment in which micro-level policy implementation—

the second area of analysis—takes place. We first example the intersections of the laws, describe their original purposes, and highlight some long-standing implementation issues that have consequences for students with disabilities (e.g., Crockett and Yell 2008; West and Whitby 2008).

The legislative histories of IDEA and NCLB offer insights into the purpose and power of these laws regarding their abilities to offer students with disabilities access to a quality education. The precursor of both laws was the Elementary and Secondary Education Act (ESEA) of 1965 (Yell et al. 1998); Title I of ESEA provided grant money for schools serving low-income students, and a later amendment, Title VI, provided grants for schools serving students with disabilities. A few years later, these histories diverge. Title I continued to be grant-based funding for schools serving disadvantaged populations, but provided no rights for individual disadvantaged students. Title VI, on the other hand, was replaced by the Education for the Handicapped Act in 1970 and eventually IDEA, and had the strength of civil rights language behind it. Thus, whereas low-income individuals do not have a constitutional protection from discrimination on the basis of their poverty (under Title I), individuals with disabilities do have such a protection.

The mode and strength of enforcement mechanisms continues to be the most significant difference between the two laws today. Mechanisms for ensuring compliance with Title I are administrative, relying on district, state, and federal agency oversight of program implementation. Title I does not provide individual low-income students any guarantee of specific educational resources or achievement outcomes. Neither can individual low-income families challenge Title I implementation in a court of law (e.g., “Individuals may not sue districts to obtain NCLB notice, SES” 2009). Low-income families can only use local or state

administrative processes to make grievances regarding implementation. The legislation assumes that all stakeholders can and will monitor for compliance. However, evaluations of implementation have found all public agencies to lack the capacity, and sometimes the will, to monitor Title I requirements (e.g., Shelley 2008; Sunderman and Kim 2007). While the law does contain a system of sanctions designed to punish non-compliance and/or non-improvement, the system as a whole has been questioned as an effective method of ensuring that low-income students receive a high-quality education (e.g., Koyama 2012; Vannest et al. 2009).

In contrast, the IDEA places a legally enforceable responsibility on the district regarding educational services for individual students with disabilities. The IDEA, as rights-based legislation, allows parents to litigate in their child's interest regarding whether a district has satisfactorily met the law's requirements. If a student does not receive procedural and substantive due process regarding IEP creation and implementation, the district may, under certain circumstances, be held legally responsible.

Recent authorizations of both the Title I and IDEA—the ESEA reauthorization in 1994, the IDEA reauthorization in 1997, and NCLB (the ESEA reauthorization in 2001)—have begun to focus on outcomes-based accountability as opposed to compliance-oriented accountability. All of these authorizations require states to disaggregate students with disabilities in their test participation score reporting and use research-based practices for all students, including those with disabilities (Cook and Odom 2013; Etscheidt and Curran 2010). Although disaggregation became required on a national level in 1994, this data only began to be systematically and nationally collected and disaggregated with the passage of NCLB and its more stringent data-collection and analysis requirements (Sec. 1111(b)(2)(C)(II); VanGetson and Thurlow 2007). NCLB requires 95% of students in each subgroup to participate in testing as one of its AYP

requirements. Some scholars see the disaggregation of data for students with disabilities as crucial for improving achievement in this subgroup (e.g., Crockett and Yell 2008; West and Whitby 2008); others see it as a potential threat to the continued assurance of individual educational benefit (e.g., Eckes and Swando 2009).

Despite these major strides in improving educational access and outcomes for students with disabilities, there is still a long road ahead for policies that address the education of this subgroup. It is not clear whether the new accountability policies can achieve increased equity regarding educational opportunities and achievement; however, existing research on these policies demonstrate that they may complicate the previous educational procedures for students with disabilities. Thus, despite the developments in legal protections for students with disabilities, the case for further inquiry into whether they are getting “meaningful access” to educational opportunities is strong, especially considering ongoing economic context challenges, outlined below.

Economic disincentives to serves students with disabilities

Educational finance analysts have long considered students with disabilities to be high-cost in terms of their educational needs (e.g., Chambers 1999; Gius 2007). Cost can be a disincentive to serving students with disabilities (i.e., local actors may prefer to use money for other purposes); however, it is sometimes simply prohibitive, in the case of students that require expensive medical services. Cost is a major reasons why the IDEA utilizes rights-based language and has been strengthened, both legally and financially, in order to help students with disabilities receive a free, appropriate public education (FAPE).²

Design of state-based special education funding formulas plays a role in how districts make decisions on the cost-effectiveness of different service options for students with disabilities. These funding designs create a variety of incentives both in terms of student identification (i.e., how districts receive money for eligible students; Cullen 2003) as well as cost-benefit decisions between in-district and out-of-district (private) service provision (Dhuey and Lipscomb 2011; Salisbury and Chambers 1994).

Market disadvantages for students with disabilities

Market-based educational programs, such as SES, rely on private competition among service providers; this type of competition creates additional issues for sufficiently funding services for students with disabilities. The assumption behind market-based systems holds that, in order to improve schools, they must be in competition with the private sector, and in order for private actors to get involved, public funding incentives must be in place. This assumption also holds that any effort to regulate private providers (such as a requirement that providers serve students with disabilities) will undermine innovation and competition.

However, research has clearly demonstrated that without protective regulations, education markets best serve consumers with the greatest ability to pay and/or consumers who are least costly to serve (e.g., Lacireno-Paquet et al. 2002; Rhim et al. 2007; Welner and Howe 2005). When high-stakes accountability systems are in place—such as pay-for-performance—education markets are even less likely to serve students whose costs of schooling, in comparison to expected achievement gains, are low. In contrast, the theory of action behind the IDEA has always been a “zero-reject” principle: “The principle that every school aged child, no matter how significant a disability he or she might have, is entitled to attend public school” (West and

Whitby 2008, 1) and is entitled to receive some educational benefit from that attendance (Smith 1998). Market-based education policies thus appear to be in direct conflict with the zero-reject framework.

Existing private markets serving students with disabilities

Despite these economic disincentives, there has also long been a private market for very specialized educational services (e.g., “IEPs omission of key services forces district to foot bill for private school” 2009, 12). However, these services are quite costly, and parents of students with disabilities can only get public subsidies for these services when districts concede that they cannot themselves provide FAPE, or when parents can prove to a court of law that only private services can provide FAPE (Alexander and Alexander 2009). Although this market serves a small percentage of total students with disabilities (approximately 1.5%; Winters and Greene 2007, cited in Anastasiou and Kauffman 2009), it still represents a significant number of students whose needs can only be met by private providers.

Instructor Capacity: Policy Context

In this section, we first look at SES quality in the larger context of the instruction that students with disabilities receive during the school day, specifically in terms of instructor qualifications. During the school day, students with disabilities may receive instruction from three kinds of teachers: “highly-qualified” special education teachers, “highly-qualified” general education teachers, and paraprofessionals. Here we look at the extent to which SES instructors of students with disabilities have similar qualifications to school-day instructors.

We first briefly examine federal and state requirements for paraprofessionals in order to review what qualifications non-certified teachers must have in order to work with students with disabilities during the school day. We do not review certified teacher qualifications, as certification to teach school-day classes clearly merits qualification to teach after school. We also examine patterns from the research on what type of teachers actually work with students with disabilities during the school day. This examination allows us to consider whether students with disabilities may be receiving instruction from similarly or differently qualified instructors during SES as opposed to during the school day.

NCLB has qualifications requirements for special education paraprofessionals, and individual states have their own requirements as well. NCLB requirements include meeting one of the following requirements: 60 semester hours of college credit; an associate's degree; passing a formal state assessment; or meeting state approval requirements *plus* either additional professional training or passing a rigorous local assessment (Sec. 1119(c)). State-level requirements for paraprofessional certification tend to be lower than federal requirements, though not always. Illinois requirements, for example, are lower than the federal requirements (Illinois State Board of Education 2012). By contrast, the Minnesota state-level certification requirements are the same as NCLB requirements, but include additional ongoing training (Minn. Stat. 125A.08(b); Wallace n.d.).

Very few studies exist regarding the observed use of paraprofessionals in special education, but the literature does give us some idea regarding how much classroom time students with disabilities may be spending with paraprofessional educators as opposed to highly qualified teachers (Etscheidt 2005). In a study of schools in Vermont, Suter and Giangreco (2009) calculated that “special education paraprofessionals [provide] 83% of the special education

instruction whereas special educators account for the remaining 17%” (87). This evidence suggests that during the school day, qualified special educators may not provide the majority of instruction for students with IEPs. Most of the instruction to students with disabilities in this study—on average—was provided by a general education teacher or by a paraprofessional. Additionally, the authors found that there was wide variation among the schools; even in a district with a high teacher-to-paraprofessional ratio, there may be schools in which students with disabilities receive little instruction from highly qualified special education teachers. Although there is almost no other empirical research on the distribution of instructional time, Suter and Giangreco’s findings suggest that instructional time for this subgroup is complex and subject to local context.

Micro-level Policy Implementation

The above analysis of policy texts and contexts reveals how these interact in ways that can influence the larger environment in which SES is implemented. This section now looks closely at how these texts and contexts play out in on-the-ground implementation in terms of two broad areas: tutor capacity and issues of confidentiality.

Patterns in Tutor Qualifications

Although there is no systematic record-keeping of SES tutors’ qualifications—as there is of school-day employees (U.S. Department of Education 2009a)—interview data with administrators and tutors suggest that the many of the providers in our sample prefer to hire certified teachers, teachers in training, and/or retired teachers. Two providers noted that they had several tutors with graduate degrees in various subjects. Table 3 shows the distribution of tutor

qualifications in observed SES sessions. In three out of the four districts, certified teachers represent a clear majority of tutors, which corroborates provider administrator preferences. Tutors certified as special educators were much more rare. Only in 12 out of the 109 observed sessions were special educators present. The table also shows that 89 sessions had instructors with a bachelor's degree or higher; only 8 tutors had less than a bachelor's degree. Considering that paraprofessional certification generally requires only two years of college-level courses, it is clear that the majority (82%) of observed SES instructors have higher qualifications than paraprofessionals. However, the 23 non-certified tutors with a bachelor's degree or higher may not have had any formal training on instruction for students with disabilities.

<insert Table 3>

Provider Trainings

Due to the small number of qualified special educators employed by providers, some providers offered trainings on special education instruction, either as part of their overall tutor training program or on an as-needed basis. A tutor at one non-profit provider described such trainings:

Now we're doing tutoring with special education children, so we had some training on that, how to deal with kids with behavioral problems, we come in and talk about the different experiences we've had, and how we've handled them, to help other tutors, and stuff. . . . We had a speaker on that, we had a speaker on reading and a speaker on special ed, . . . went over the books, different materials that we use, or found useful, question-and-answer sessions, we did some mock testing, like the test that we would give the kids.

A multi-state online provider described similar trainings, though these were limited to four hours of professional development sessions per year. One provider hired a special education teacher as a tutor who then provided internal professional development and strategies to other tutors, while another provider hired a teacher trained in special education to help develop individual learning plans. Though these practices appear to be promising, without in-depth analysis of the content and efficacy of provider-led special education trainings, it is not possible to conclude whether these practices resulted in higher quality instruction for students with disabilities.

Supply and Demand for OST Instructors

Closely related to tutor qualifications are the forces of instructor supply and demand, which are different for school-day teachers than for OST instruction. The benefits of school-day teaching positions include health benefits and retirement; part-time tutoring jobs usually do not. The part-time, after-school nature of the job also requires flexibility in terms of hours and location.

There are also issues regarding uncertainty of student demand; these numbers vary in general from year to year, but within the total number of students, the number of students with disabilities and the types of those disabilities vary even more. Such uncertainties limited providers' ability to recruit and train the right number of tutors in advance; as well, since the qualifications needed to address certain disabilities varied, some provider administrators had difficulty predicting qualifications:

It's difficult with the SES program because when you're hiring, you never know what students you have. So we do have . . . tutors who have those [special education] qualifications. But we don't specifically look out for them when hiring for the SES

program in particular because we don't really know what schools we'll be at or which students we'll be serving.

This provider decided not to specifically recruit special educators because of uncertainty.

However, other providers purposely recruited special educators because they learned over years of implementation that they always receive a significant percentage of students with disabilities.

This practice is more common in providers with greater market share:

First of all what I look for, I do talk to administrators, and I do talk to other staff at schools, just to get a feel of, which are your best instructors, I look for instructors that are [district] instructors, that are certified, I look for a lot of instructors who have backgrounds in special education, because a lot of our students do have IEPs, so that tends to be an important issue.

Several other providers discuss the strategy of meeting demand, once enrollment demographics are known, by trying to hire qualified tutors at the last minute. The benefit of waiting until exact student needs are known is that providers can recruit specific teachers, sometimes from the student's school:

A couple years ago there was a student who had an aide during the school day, and we hired that aide to work with him after school, we kept him in the group, because we thought it was good for him to be part of the group, but he sort of worked with the group but kind of independently with this aide with him, because he could not really do in the same way that the whole group did either, and so this person obviously working with him during the day knew him and knew what to expect and vice versa, and so that worked really well, so as needed we've hired people to meet specific needs like that.

The strategy of matching students to within-building teachers was somewhat common, when possible, as these teachers either already knew individual student strengths, weaknesses, and learning styles or had access to school-day teachers that could provide information, suggestions, or strategies for these students.

Finally, although some SES tutors have special education backgrounds—though, as shown above, the percentage of special education teachers is low (11%)—these teachers do not always get matched with the students who need them. A primary reason for this is that SES providers do not have access to school records or staff with knowledge about students’ needs, and therefore cannot match students and tutors accordingly; logistics, such as tutor and student schedules and locations, is a challenge to special education tutor-student matching as well.

Providers’ Limits of Special Education Services

In contrast to the theoretical predictions in the previous section on the financial disincentive to serve students with disabilities, these cases are rare and seem to occur after a good-faith effort on the part of the provider. Although the policy includes a provision that if no SES provider is able to provide special education services, the district must either provide the services itself or contract with another provider that is able to provide services (Sec. 1116(e); 34 C.F.R. §200.46(a)(4); 34 C.F.R. §200.46(b)(3)), this provision does not appear to be used often by providers. In only a few cases, providers have let the district know that they could not serve a particular student with intensive needs or severe disabilities:

I would say since we’ve been doing this we may have turned away one or two students where we just absolutely could not work with them. . . . And sometimes what we do is notify the district and they may recommend another tutoring program and reassign that

student. And what we've done in some instances is if they're kind of bordering on severe, we will find someone on the outside to go in and tutor them in the home.

Another case, involving a student with severe disabilities in a family speaking a less common language for that district, occurred in another district, with a similar outcome. These two examples do demonstrate that providers cannot serve all students that enroll with them; however, they also show that these providers attempted to serve these students with a good-faith effort and when they could not, they made sure to notify the district so that the student would receive appropriate services from a different source.³

There is no indication in our data sample from four districts that any providers attempted to avoid serving students with disabilities on a systematic level, although some providers did choose not to advertise services for students with disabilities. The expectation that a tutoring organization will have the capacity to serve every type of disability is unrealistic, especially considering that IDEA reauthorizations recognize that sometimes even public school districts do not have the resources to appropriately serve some students with disabilities (34 C.F.R. §300.302, 1999).

The second example given above also highlights the compounded demand issue of finding tutors who have training in both special education services as well as the ability to serve English language learners (ELL). The intersection of language and disability requires particular kinds of instruction (e.g., Artiles and Ortiz 2002), and several providers noted the difficulty of finding tutoring staff who have training for both ELL and special education instruction.

Confidentiality: Friend or Foe of Students with Disabilities in SES?

The ambiguous and sometimes contradictory language among policy texts can create problems for implementation and instructional quality on the ground level. The ideal supplemental learning environment for students with disabilities involves a qualified tutor with access to student IEPs. Yet our data reveal that the sharing of IEPs rarely occurs in practice, primarily due to confidentiality requirements in IDEA and the Family Education Rights and Privacy Act (FERPA). Confidentiality requirements in these laws are designed to protect students from negative consequences of data-sharing. However, in the case of SES, the difficulty of sharing educational information with SES providers hinders instructors both from providing correct accommodations and from aligning instruction with students' IEP goals.

Although the legal language is ambiguous, there may be an allowable role for SES providers in terms of access to IEPs for the purposes of instructional consistency. IDEA language consistently references "participating agencies" regarding confidentiality. A participating agency is defined as any school district, agency, or institution that collects, maintains, or uses personally identifiable information, or from which information is obtained, under Part B of the IDEA (34 C.F.R. §300.611). It is not clear whether an SES provider could be considered a participating agency, since SES is not included in IEPs and SES is not discussed in the IDEA. The language in the FERPA provisions, however, suggest that SES providers may fall into the category of personnel that have a "legitimate educational interest" in receiving a student's educational record (20 U.S.C.S. §1232g(b)(1)(A)). Huefner (2006) explains that, "Typically, teachers, building administrators, other school professionals, and even student teachers and parents assisting teachers in the classroom can be authorized to see a student's records" (225-226); these examples suggest that SES providers could arguably fit into this category.

However, if SES providers cannot be considered to have a legitimate educational interest, then IEPs may be shared only with specific parental consent (20 U.S.C.S. §1232g(b)(2)(A)). Due to this policy ambiguity, the processes for sharing such information vary in type and frequency across districts. Several districts in our study include a consent section on the enrollment form regarding educational record disclosure to providers. However, even in these cases, districts have not systematically released IEPs to providers. Some districts give student IEPs to providers if the provider requests additional information regarding a specific student, while some provide student identification status (though not the actual IEP) automatically through an SES database. Other districts believe that the provider must contact the parent directly to get this information (34 C.F.R. §300.123, §300.622, §300.623). Due to the variety in these district interpretations of confidentiality restrictions, providers and tutors must use a variety of strategies in order to get more detailed information about students' needs; the next section examines these strategies.

Instructor Access to IEPs

Interviews with tutors and provider administrators emphasize the need for access to IEPs in order to offer appropriate instruction. Without specific knowledge of a student's needs, differentiation involves tutor guesswork that may contradict the requirements within a student's IEP. The majority of tutors that we interviewed and observed were forced to rely on their own interpretations of students' presenting ability levels and educational needs, as opposed to having guidance from an IEP or conversations with students' teachers.

Based on provider and tutor responses, access to student IEP information depends primarily on two related details: where the provider is located (on school grounds or not), and whether the provider hires tutoring staff who are also employed by the school. Off-site and

online providers primarily get information about students' disabilities directly from parents via phone calls, emails, or in-person meetings. For non-school-based providers, getting IEP information from school staff was nearly impossible. Several tutors, from different non-school-based providers, discussed the challenges to getting information from the school-day teacher on students' learning needs.

While most provider staff did not have problems getting the information from parents, there were a few challenges. For example, providers noted that some parents preferred not to share their students' special education status, especially if they did not agree with the identification. One online provider administrator explains how they try to get information when the parent is not forthcoming:

Many times because of confidentiality . . . the districts can't divulge that information. So it really has to be parent-driven. . . . That's definitely asked in the first welcome call.

Now it doesn't mean that we catch everyone because some parents for whatever reasons don't wanna have their child labeled as special needs or disability or what have you. But in that case a lot of the times the teachers are very trained to kinda pick up on those things. So sometimes when they notice that a student might have a certain learning style or maybe some sort of a disadvantage in their learning, they'll flag it.

There were also occasional cases in which parents did not seem to be able to share their students' educational needs with tutors:

So [student] has a learning disability in math. . . . Her parents haven't really been able to communicate much to me about what she needs extra help with, so I just kinda work with her and ask her along, like "What do you need? Should we do this? Is it easier if you write it out or if you just talk about it?" But she has not lived with her parents very long,

she was living with her grandparents and now just moved in with her parents so I'm not sure they really are all that familiar.

In contrast to these off-site or online providers, for school-based providers, data sharing and communication between providers and school/district personnel was dependent on the relationship between the provider and school-level staff. Some districts have school-level SES coordinators, who usually act as a liaison between parents and providers. If there is no existing relationship between the school and the provider, communication between school personnel and tutors is more difficult to facilitate. Further, some schools and/or districts have strained relationships with providers, which can prevent providers from receiving up-to-date information on their students' educational needs. School-day teachers who are employed by the provider as SES tutors can more easily negotiate access to IEPs and personally network tutors and teachers to discuss students' specific needs, as this provider explains:

We also do kind of a double approach, so we get our list of who's IEP and ELL, and we share that with the teachers, but a lot of times there's things that aren't on that little spreadsheet, so, we have the teachers come and they'll share what's going on in their classroom, you know, "I'm having this issue with this student," and we can work through it, and we actually learn a lot that way, 'cause they'll be like "I talked to the classroom teacher and they said this is this," so we take the information we get from the district and we share it to our tutors, but then a lot of times they get information that they then share with us, and we kind of have that communication going both ways.

Thus, tutor access to SES students' school-day teachers can be helpful in terms of understanding the needs of particular students, even if that student may not be currently identified as having a disability—in which case the provider would not otherwise know that the student might be

having particular problems or be in the process of identification. These data clearly show that tutoring location and format—school-based versus off-site or online—plays a significant role in instructor access to IEP information.

Implications and Recommendations

Quality of tutoring for students with disabilities turns on a variety of complex legal and implementation issues. Contextual patterns, such as private market forces of supply and demand, and lack of clarity in macro-level policies influence the opportunities, interpretations, and decisions regarding implementation of SES for students with disabilities. These patterns also affect the quality of SES tutoring that students with disabilities receive, characterized by a lack of special education-certified tutors and barriers to tutor access to information required to make informed instructional decisions.

At the same time, these patterns are also complicated by trade-offs, such as inclusion and subject-specific instruction. There clearly are benefits to including students with disabilities in general education classrooms and providing instruction via general education or subject-specific instructors. While the percentage of special education teachers providing SES is low, the percentage of general education certified and retired teachers is high; although general education instructors are not specialized to work with students with disabilities, all certified teachers have access to materials and human resources that are needed to appropriately serve students with disabilities. The hiring of certified teachers from within schools where SES tutoring takes place especially helps mitigate problems regarding access to IEPs; these teachers have or can get access to this information using teacher and administrator networks.

In addition to utilizing teacher networks, there are also promising patterns that relate to how providers decide to address structural issues of instructor supply and demand. Although our data show that most providers do not know the special education status or specific educational needs of their students prior to enrollment, some providers have begun to make informed projections regarding demand patterns. Although such projections may not be able to completely prepare providers for all specific disabilities, they do allow providers to have staff hired and trained to meet a variety of student needs.

Despite these promising practices by a few providers, however, the bottom line is that time, effort, and public funding are wasted when tutors for students with disabilities lack the capacity and/or information to serve them; as well, even when qualified tutors are available, they may not be matched with the students who most need their qualifications. Access and instructional quality for student with disabilities—a high policy priority, as these students comprise a historically underserved population—can be compromised by both policy ambiguity and contradictions. The tangled web of policies works against the intent of the law—that is, the provision of high quality supplemental instruction and increased opportunities to learn for *all* students with limited income.

These findings are timely, given that the design of SES is currently undergoing state-specific adjustments due to NCLB waivers that have been granted by the U.S. Department of Education. These waivers offer new possibilities for designing OST programs that take the best of SES and improve upon those elements. The lessons in this paper offer suggestions for improving these OST services for students with disabilities and provide research-based findings on which to recommend changes.

Based on our findings, we suggest that the next steps for OST program and policy improvement must include requirements that providers hire qualified teachers to work with students with disabilities. Depending on an individual student's IEP, a general education teacher could potentially meet this requirement; however, the student's IEP could also require a provider to hire an instructor certified in special education. This requirement would also help to increase the streamlining of matching systems for tutors and students with specific disabilities. Although the legal issues of confidentiality and consistency requirements around students' IEPs are more complex, the requirement to hire qualified tutors for students with disabilities could lead to increased sharing of IEPs; if districts knew that providers had a firm requirement regarding tutor qualifications, they might be willing to help facilitate this sharing. In addition, policymakers could help lower the ambiguity among policies such as the IDEA and FERPA by specifically referencing information-sharing in out-of-school educational programs. These recommendations for improvement—requiring qualified tutors, facilitating IEP alignment, and clarifying confidentiality restrictions—are crucial changes that must happen in order for students with disabilities to receive consistent and high-quality instruction in SES, or in any OST setting.

Tables

Table 1. Data collected by type and site.

	Chicago	Dallas	Milwaukee	Minneapolis
District interviews	6	7	5	7
State interviews	1	1	1	1
Provider administrator interviews	11	10	15	18
Tutor interviews	17	17	18	24
Parents in focus groups	16	45	33	61
Observations	24	27	38	35

Table 2. Data analyzed by research question.

Research question	Data collected and analyzed
How do the designs of and interactions between NCLB and other legislation impact access to and quality of OST instruction for students with disabilities?	Federal and state policy texts; district and state interviews; district implementation documents (e.g., enrollment forms; teacher referral form)
What are the major barriers to implementation of SES for students with disabilities, and how have stakeholders addressed these barriers?	District and state interviews; provider administrator and tutor interviews; parent focus groups; district implementation documents (e.g., enrollment forms; teacher referral form)

Table 3. Tutor qualifications by district, 2009-12.

District	Chicago	Dallas	Milwaukee	Minneapolis	Total
Certified or retired teacher (Sp. Ed.)	16 (1)	7 (6)	25 (0)	18 (5)	66 (12)
Non-teacher with bachelors or higher degree	4	1	7	11	23
Non-teacher without bachelors degree	3	2	2	1	8
Non-teacher with no degree info	1	2	1	1	5
No info on tutor background	1	7	1	0	9
Total number of observed in-person and live-tutor online sessions	24	19	36	30	109

Source. Observations.

Note. Numbers correspond to number of sessions, not number of teachers in a single session.

Some sessions had multiple teachers. When a session had teachers from multiple categories, it is counted once in each relevant column. Special education teachers are indicated in parentheses in the first row, as a subgroup of certified or retired teachers.

Notes

1. The larger study contains data from six districts, but the two districts not included in this paper were not part of the larger study for the entire duration of the study. Additionally, the data included in this paper is from the first three years of the study (2009-12).
2. Legally, agencies do not have to provide the maximum educational benefit or opportunity, but rather “meaningful access” to education: “The Court addressed the argument that Congress intended FAPE to provide ‘full educational opportunity’ to implement the equal protection clause of the 14th Amendment. The Court interpreted the concept of equal or full opportunity to require meaningful access rather than the same or commensurate services that are provided to students without disabilities” (*Board of Ed. v. Rowley* 1982; Huefner 2006, 241).
3. According to the law, if no providers are able to serve a student with a disability, the district must serve that student—even if the district does not have a district-run provider (Section 1116(e); 34 C.F.R. §200.46(a)(4); U.S. Department of Education 2009b, 19). There are no occurrences in our data of this, but it is possible that a district would have to offer OST services to a student with a disability if no approved provider could offer services.

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